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R. *v.* Arradi, [2003] 1 S.C.R. 280, 2003 SCC 23

Ziad Arradi *Appellant*

v.

Her Majesty The Queen *Respondent*

Indexed as: R. *v.* Arradi

Neutral citation: 2003 SCC 23.

File No.: 28919.

2002: December 3; 2003: April 17.

Present: McLachlin C.J. and Gonthier, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

on appeal form the court of appeal for quebec

Criminal law — Contempt of court — Summary procedure — Accused refusing to answer certain questions during his testimony — Whether trial judge erred in convicting accused of contempt of court and sentencing him instanter and in presence of jury — If so, whether curative proviso in s. 686(1)(b)(iii) of Criminal Code applicable — Criminal Code, R.S.C. 1985, c. C-46, ss. 686(1)(a)(ii), 686(1)(a)(iii), 686(1)(b)(iii).

The accused was charged with two first degree murders and six attempted murders. At trial, the recording of a conversation between an informer and the accused was the Crown's principal evidence. During his testimony the accused claimed that he had fabricated the information related to the informer because he hoped to earn the respect of his fellow inmates and that this notoriety would enable him to escape reprisals from a third party. The accused repeatedly refused to answer questions concerning the identity of those who had allegedly provided him with information about the crime. The trial judge, in the presence of the jury, cited the accused for contempt of court, refused to postpone the proceeding and requested submissions as to sentence. He sentenced the accused to three years' imprisonment. At the conclusion of the trial, the jury found the accused guilty on the eight counts. The Court of Appeal dismissed the accused's appeal.

Held: The appeal should be dismissed.

The summary contempt of court procedure is a three-step procedure. Citing in contempt may take place any time it is determined that intervention is required. However, conviction and sentencing for contempt of court *instanter*, where it is not urgent and imperative to act immediately, is an error of law that may be reviewed by an appellate court. When the contempt is committed by an accused who is testifying, the judge's discretion as to how to proceed, which will depend on, *inter alia*, the nature of the conduct in question, should be guided by the need to maintain order and preserve the authority of the court, on the one hand, and not to compromise the impartiality of the judge and the judicial process, on the other. It is in the interests of justice that a jury know that an accused who chooses to testify is compelled by law, like any other witness, to answer the questions put to him or her, and that there are serious legal consequences for failing to comply with the law. When the judge convicts an accused of contempt of court *instanter*, in the presence of the jury, the judge must avoid giving the jury the impression that he or she is making a determination as to the credibility of the accused. The judge must maintain an appearance of impartiality in all circumstances.

In this case, the judge was justified in commencing contempt of court proceedings using the summary procedure and in citing the accused for contempt, since that was an appropriate method of preserving the authority of the court. However, the judge erred by combining the citation and conviction in a single proceeding. He was not justified in convicting the accused *instanter* and thereby depriving him of the procedural guarantees to which he was entitled, since the circumstances were not such that it was urgent and imperative to act immediately. The real question, however, concerns the consequences that the error had for the trial. The judge erred in exercising his discretion in that there was an inherent risk in the procedure adopted that the jury would misunderstand the meaning of the conviction for contempt and interpret it as representing the judge's opinion of the accused's credibility in relation to the substance of his defence. An adjournment was required to ensure that the judge used only the least possible power adequate to the end proposed in the exercise of his discretion.

The curative proviso in s. 686(1)(*b*)(iii) of the *Criminal Code* should be applied here. In convicting the accused of contempt of court *instanter* when it was neither urgent nor imperative that he do so, the trial judge committed an error of law within the meaning of s. 686(1)(*a*)(ii) of the *Criminal Code*. The accused did not suffer such prejudice from the judge's error that he was deprived of his right to a fair trial. This error, which was essentially procedural, did not in itself constitute a miscarriage of justice within the meaning of s. 686(1)(*a*)(iii) or result in a failure of justice, which would have prevented the curative proviso from being applied. Moreover, no substantial wrong or miscarriage of justice, within the meaning of s. 686(1)(*b*)(iii), occurred. Even if the error was not totally harmless, the verdict would necessarily have been the same if it had not occurred. The real damage done to the accused's credibility resulted from his refusal to answer, and not from his conviction for contempt. The judge's instructions substantially reduced the risk that the jury wrongly believed that the accused had been convicted of contempt because the judge did not believe his defence. Finally, the evidence against the accused was overwhelming. The accused freely chose to conduct his defence in such a way as to offer the jury only a partial truth, and that necessarily affected the credibility of his position.

Cases Cited

Applied: *R. v. K. (B.)*, [1995] 4 S.C.R. 186; *R. v. Khan*, [2001] 3 S.C.R. 823, 2001 SCC 86; **referred to:** *Fanjoy v. The Queen*, [1985] 2 S.C.R. 233; *R. v. Tarrant* (1981), 63 C.C.C. (2d) 385; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *Balogh v. Crown Court at St. Albans*, [1974] 3 All E.R. 283; *Hébert v. Procureur général du Québec*, [1966] Que. Q.B. 197; *United States v. Wilson*, 421 U.S. 309 (1975); *R. v. Bevan*, [1993] 2 S.C.R. 599; *Colpitts v. The Queen*, [1965] S.C.R. 739; *R. v. Jolivet*, [2000] 1 S.C.R. 751, 2000 SCC 29.

Statutes and Regulations Cited

Criminal Code, R.S.C. 1985, c. C-46, ss. 10(1), 184.1, 184.2, 686(1)(*a*)(ii) [am. 1991, c. 43, s. 9 (Sch., item 8)], (iii) [*idem*], (*b*)(iii) [am. c. 27 (1st Supp.), s. 145; am. 1991, c. 43, s. 9 (Sch., item 8)].

Authors Cited

Miller, Christopher J. *Contempt of Court*, 3rd ed. Oxford: Oxford University Press, 2000.

APPEAL from a judgment of the Quebec Court of Appeal (2001), 48 C.R. (5th) 83, [2001] Q.J. No. 5087 (QL), dismissing the accused's appeal from his conviction on two counts of first degree murder and six counts of attempted murder. Appeal dismissed.

Anne-Marie Lanctôt and *Nellie Benoit*, for the appellant.

Lori-Renée Weitzman and *Stella Gabbino*, for the respondent.

English version of the judgment of the Court delivered by

1 ARBOUR J. — This is an appeal as of right which raises a question of procedural fairness in a trial on murder and attempted murder charges. The only issue before us is whether the appellant's conviction for contempt of court and the consequent imposition of a sentence of imprisonment for three years, by the trial judge in the presence of the jury, were an error in the circumstances and, if so, whether the curative proviso in s. 686(1)(*b*)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46, should be applied in respect of that error.

I. Facts

2 On the night of December 17, 1995, two cars drove by very close to a group of eight people who were walking on a sidewalk. A passenger in one of the cars opened fire and two pedestrians were killed.

3 There was very little information available to the police when the investigation first started. On January 26, 1996, Herby Jean-Charles, who was then incarcerated on a robbery charge, asked to meet with the detective in charge of the investigation into the shooting. He then offered to provide them with information, in exchange for a deal. He told the police officers that the appellant was one of those involved in the double murder. However, the negotiations broke off because Mr. Jean-Charles' demands were considered to be unrealistic.

4 The investigators met with the appellant on several occasions while he was incarcerated at Leclerc Institute to obtain his cooperation. They were met with refusal. During that time, the security classification assigned to the appellant, who was also a suspect in another murder case, was revised upward and he was placed in administrative segregation. On November 6, 1996, the investigators again interviewed Mr. Jean-Charles, at the Donnacona penitentiary, and entered into an agreement with him under which he was to become a "special witness" and participate in recording a conversation with the appellant. A consent to the interception of private communications was signed on that date (ss. 184.1

and 184.2 of the *Criminal Code*). The appellant was transferred to Donnacona and on November 18, 1996, he had a conversation with Mr. Jean-Charles which was recorded.

5 On September 3, 1997, two first degree murder charges and six attempted murder charges were laid against the appellant. Following a *voir dire* held between February 26 and March 3, 1998, the judge found the evidence from the interception of the private communication to be admissible: [1998] Q.J. No. 1276 (QL). That communication was the Crown's principal evidence against the appellant.

6 The appellant's defence rested primarily on his assertion that he had fabricated the information he related to the informer, Herby Jean-Charles, on November 18, 1996, which information was tape recorded. He said that he had invented that story after learning from the police and Herby Jean-Charles that an Emmanuel Zéphyr [TRANSLATION] "was out to get [him]". His justification for concocting an incriminating lie was that he hoped to earn the respect of his fellow inmates by saying he had committed the murder, and that this "notoriety" might have enabled him to escape any reprisals from Emmanuel Zéphyr. He said that he had put together the details of his lie from details related in the newspapers, from his imagination and from information provided to him by third parties.

7 On March 11, 1998, at the very end of the trial, the appellant repeatedly refused to answer questions concerning the identity of the third parties who had allegedly provided him with information about the crime. The reason given by the appellant was that answering those questions could put his life and the lives of his family members in danger.

8 The proceeding out of which the appeal arises took place as follows. At the end of the examination-in-chief of the appellant, counsel for the appellant asked him the following two questions:

> [TRANSLATION]
>
> Q Mr. Arradi, can you now give us the names of the persons, the two persons from whom you received these confidences?
>
> A No, I can't.
>
> Q Why?

A Because it would put my life and the lives of my family in danger, and it is against my principles. I will never do that.

Q The "beef" you are taking, who are you taking it for?

A I can't tell you that either.

Q I have no other questions for the witness.

9 At the outset of her cross-examination, counsel for the Crown returned to the question, as follows:

[TRANSLATION]

Q You agree with me. You say that you received confidences concerning this shooting?

A Yes, that's correct.

Q It's correct that you received confidences. Can you tell us, first, in what circumstances you received those confidences?

A No particularly special circumstances, just in talking.

Q Fine. Okay. We are going to get you to give us a few more details. "No particularly special circumstances", fine. Let's start with the place, for example, where those confidences took place.

A In an apartment.

Q In an apartment. An apartment. What apartment?

A I refuse to answer that question. That could identify and point the finger at people.

Q So you do not want to answer the question about the apartment? You don't want, if I understand you, to give the members of the jury the address of that apartment?

The judge then intervened:

[TRANSLATION]

Q I am certain that your counsel has informed you of the consequences that may arise from refusing in court to answer the questions put to you.

A Yes, your Honour.

Q I am certain that your counsel has explained to you that refusing to answer a question would be, on its face, a contempt of court.

A Yes, I have been informed of that, your Honour.

Q And that refusing to answer questions in a murder case is an especially serious contempt of court.

A I have been informed of this, your Honour. Yes, it is serious.

Q And that the sentence you could receive for such a contempt of court could be as much as five years.

A I was not aware of that, but I would prefer that to finding myself dead or something happening to my family.

Q So, what I want you to realize is the consequences that might arise for you from intentionally refusing to answer the questions that might be put to you. Do you want me to adjourn for a few minutes so that you can discuss this further with your counsel?

A Yes, if possible. [Emphasis added.]

10 Counsel for the Crown then returned to the subject several times, and the appellant continued to refuse to answer, each time for the same reasons. In all, there were seven questions that were not answered. Toward the end of the Crown's cross-examination, the judge asked what the situation was for the questions that the witness had refused to answer. Counsel for the Crown replied that she needed a few minutes to think about it. In the meantime, counsel for the appellant asked permission from the judge to consult with her client to [TRANSLATION] "give him an explanation again".

11 Although the Crown did not return to the question after a brief adjournment, the judge, of his own accord, after defence counsel had indicated that she had no other questions to ask the witness, asked the appellant whether it was still his intention not to answer certain of the questions he had been asked. The appellant replied in the affirmative, and the judge immediately cited him for contempt of court.

12 It would seem that the "citation" for contempt was intended and perceived as a conviction, because the judge immediately requested submissions as to sentence. The judge denied the defence's request to postpone that proceeding, and everything went ahead with no further interruption, in the presence of the jury. In her submissions, counsel for the appellant said:

[TRANSLATION] So, my Lord, what I have to say is simply that Mr. Arradi has given an answer, to the effect that for him to give information that would lead to identification of the persons allegedly involved as perpetrators in the double murder incident for which he is being tried would amount to putting his life in danger, and if he gives those names, it is his belief that he will be ensuring that once he is imprisoned he will be killed on the inside.

So the only justification he is giving the Court for refusing to answer is that there will be reprisals against him that will result in his death, and that is why he prefers, in spite of everything, to commit the crime of contempt of court and be sentenced, and he fears that giving names of individuals could also result in consequences for the members of his family, who are not inmates, against whom violence might be done.

So I have no other submission to make to the Court in respect of the sentence that this deserves.

13 The Crown stressed the seriousness of the matter and left the matter to the Court's discretion. The judge moved immediately to sentence the appellant to three years' imprisonment. The entire proceeding, from "citation" to sentencing, took place in the space of about two minutes. In his charge to the jury, the judge gave the following instructions concerning the appellant's conviction for contempt of court:

[TRANSLATION] Contempt of court. You saw me sentence the accused *instanter* to three years in prison for refusing to answer questions. Now in our judicial system we do not have two kinds of witnesses, those who are obliged to answer questions, out of obedience to their oath to tell the truth, the whole truth and nothing but the truth. So we do not have two kinds of witnesses, those who can tell just a part of the truth and those who are obliged to tell the whole truth. There is only one kind of witness. When you enter the box, you agree to tell the truth, and then you tell the truth or else what happened to him happens to you. We do not have two systems of justice, we do not have two laws, there is only one law, and in the Criminal Code, here, it says that a witness who refuses to answer is guilty of contempt and if he does it in your presence he will be punished in your presence. Very well.

So that punishment, for violating his oath and for being publicly guilty of contempt, he received a sentence, but you may not, you must not, deduce anything concerning his guilt or lack of guilt from that sentence, just as for a criminal record. So you may not use that for determining whether he is guilty or not guilty. An incident occurred, he was confronted, I explained the situation to him, he did not comply, there was a consequence and he received it in your presence, period, end of story.

> So you may not deduce anything concerning his guilt or lack of guilt from the contempt or the punishment. It would be unfair for you to do that, and you would be violating your oath.

14 At the conclusion of the trial, on March 15, 1998, the appellant was found guilty on the eight counts against him, two first degree murders and six attempted murders, and sentenced to concurrent terms of life imprisonment.

II. Quebec Court of Appeal (2001), 48 C.R. (5th) 83

15 The Court was unanimous as to the other grounds of appeal, but divided on the only question that is before us, namely the question of contempt of court.

A. *Delisle J.A.*

16 Delisle J.A. rejected the appellant's argument that the trial judge had erred in convicting him of contempt of court in the presence of the jury. In his view the statement by counsel for the appellant, explaining that her client preferred to commit the crime of contempt of court and be sentenced rather than to answer the questions, [TRANSLATION] "means that the error committed by the trial judge, in skipping the step where a person who is cited for contempt of court must be given an opportunity to offer the reasons why he or she should not be found guilty, may be disregarded" (para. 47).

17 He added that [TRANSLATION] "[t]he appellant may not complain of the possible consequences of things he freely did" (para. 52). The trial judge's instructions to the jury were clear; he said [TRANSLATION] "you may not and you must not speculate as to the answers he did not give". As well, the trial judge warned the appellant several times that if he did not answer the questions, he would be liable to a conviction for contempt of court. Thus, for the jury, [TRANSLATION] "what happened subsequently . . . was therefore not unexpected" (para. 54).

B. *Robert J.A.*

18 The opinion of Robert J.A. concerning the contempt of court is as follows (at paras. 60-63):

> [TRANSLATION] I agree with counsel for the prosecution that the circumstances surrounding the citation for contempt [of court] seem to be somewhat unusual, in that the appellant was cited for contempt and sentenced *instanter* in the presence of the jurors.
>
> It was not necessary for sentence to be passed immediately and it would have been much preferable for sentencing to be postponed to the end of the trial.
>
> However, did the appellant suffer serious prejudice such as would require that this Court order that a new trial be held? I do not believe so.
>
> Even if we assume that the accused suffered some prejudice, nonetheless the judge cautioned the jury specifically, clearly and articulately on that issue.

19 As well, Robert J.A. was of the opinion that s. 686(1)(*b*)(iii) of the *Criminal Code* applied because [TRANSLATION] "the verdict would not have been different if the citation for contempt had not occurred" (para. 64).

20 Accordingly, like Delisle J.A., Robert J.A. dismissed the appeal.

C. *Fish J.A. (dissenting)*

21 Fish J.A. would have allowed the appeal and ordered a new trial. He was [TRANSLATION] "of the opinion that the appellant did not . . . acquiesce either in the finding that he was guilty of contempt or in the procedure adopted by the judge" (para. 73).

22 First, Fish J.A. said that he understood the difficult position that counsel for the appellant was in. For one thing, counsel not only had to make submissions to the judge on sentencing, but she also [TRANSLATION] "could cite only the facts already in evidence before the jury in relation to the

murder and attempted murder charges that were the subject of the trial" (para. 70). For another, counsel [TRANSLATION] "in addressing the judge, . . . could hardly disregard the presence of the jury which was very soon going to have to consider the fate of her client in relation to the murder and attempted murder charges" (para. 71).

23 Fish J.A. observed that the Crown was correct to acknowledge that the trial judge [TRANSLATION] "acted hastily and impulsively" (para. 74). Fish J.A. agreed with the appellant's argument that it was [TRANSLATION] "very possible, if not probable, that the trial judge's finding, in the jurors' presence, that the appellant was guilty of contempt of court meant, to them, that the judge himself was rejecting the appellant's explanation of his refusal to identify certain individuals" (para. 76). Accordingly, Fish J.A. was of the opinion that by convicting the appellant in the presence of the jury, the trial judge caused the appellant to suffer prejudice, by [TRANSLATION] "express[ing] an opinion as to the legitimacy, if not the truth, of a crucial aspect of his testimony" (para. 75).

24 Unlike his colleagues, Fish J.A. also believed that the charge on the question of the contempt of court conviction not only exacerbated the trial judge's error, but also adversely affected the appellant's fate at the hands of the jury. In the opinion of Fish J.A., [TRANSLATION] "[t]he instruction thus meant that the finding that the appellant was guilty of contempt of court and the sentencing decision, like his criminal record, allowed the jury to draw a negative inference concerning the appellant's credibility" (para. 81). In his opinion, that inference should not have been permitted.

25 Lastly, Fish J.A. concluded that [TRANSLATION] "this was not simply a 'wrong decision on a question of law'" (para. 82) within the meaning of ss. 686(1)(*a*)(ii) and 686(1)(*b*)(iii) of the *Code*. On that point, Fish J.A. quoted what was said by McIntyre J. in *Fanjoy v. The Queen*, [1985] 2 S.C.R. 233, at p. 240, concerning errors that do not affect the fairness of the trial. Fish J.A. also said that he would not have applied the curative proviso even though this was only an error of law, and quoted Martin J.A. of the Ontario Court of Appeal in *R. v. Tarrant* (1981), 63 C.C.C. (2d) 385, on that point.

III. Issue

26 The appellant stated the issue as follows: Did convicting the accused of contempt of court and imposing a sentence of three years' imprisonment *instanter* and in the presence of the jury cause him to suffer serious prejudice and an irreparable wrong and affect the fairness of the trial? The respondent stated the issue as follows: Did the majority of the Court of Appeal err in applying the curative proviso in s. 686(1)(*b*)(iii) of the *Code* to dismiss the appeal?

27 The relevant portions of s. 686 of the *Criminal Code* read as follows:

686. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

(*a*) may allow the appeal where it is of the opinion that

(i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,

(ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or

(iii) on any ground there was a miscarriage of justice;

(*b*) may dismiss the appeal where

(i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,

(ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (*a*),

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (*a*)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or

(iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;

IV. Analysis

28 It is essential to keep in mind throughout the analysis of this issue that this is not an appeal from the appellant's conviction for contempt of court. Rather, we must consider whether the appellant's murder trial was vitiated by an error of law that caused substantial wrong or a miscarriage of justice or whether the appellant was denied justice.

A. *Conviction and Sentencing for Contempt of Court Instanter*

29 The courts are given the power to punish contempt of court "so as to maintain the dignity and authority of the judge and to ensure a fair trial" (*B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at p. 238 (*per* Dickson C.J.), citing *Balogh v. Crown Court at St. Albans*, [1974] 3 All E.R. 283 (C.A.), at p. 288 (*per* Lord Denning)). Contempt may be dealt with by one of two procedures: the ordinary procedure, which provides the accused with the usual procedural guarantees of a criminal trial, or the summary procedure, which allows the judge to avoid the formalities of a criminal trial to convict a person of contempt of court, even *instanter* in some cases (*B.C.G.E.U.*, *supra*, at p. 238; *R. v. K. (B.)*, [1995] 4 S.C.R. 186, at paras. 8-9; *Hébert v. Procureur général du Québec*, [1966] Que. Q.B. 197, at p. 227). The summary procedure is also recognized by the *Criminal Code*:

10. (1) Where a court, judge, justice or provincial court judge summarily convicts a person for a contempt of court committed in the face of the court and imposes punishment in respect thereof, that person may appeal

(*a*) from the conviction; or

(*b*) against the punishment imposed.

30 The summary procedure deprives an accused of certain guarantees that he or she is

normally given, such as the presumption of innocence. The courts, however, have imposed certain requirements on this procedure that are relevant in this case. First, this Court has held that using the summary contempt of court procedure can be justified only in cases where it is urgent and imperative to act immediately (*K. (B.)*, *supra*, at para. 9). It is also clear that, other than in exceptional circumstances where the *instanter* summary proceeding is justified, the power to punish someone summarily for contempt of court is subject to the requirements of natural justice. Those requirements were summarized by Lamer C.J. in *K. (B.)*, at paras. 15-16:

> There is no doubt in my mind that he was amply justified in initiating the summary contempt procedures. I, however, find no justification for foregoing the usual steps, required by natural justice, of putting the witness on notice that he or she must show cause why they would not be found in contempt of court, followed by an adjournment which need be no longer than that required to offer the witness an opportunity to be advised by counsel and, if he or she chooses, to be represented by counsel. In addition, upon a finding of contempt there should be an opportunity to have representations made as to what would be an appropriate sentence. This was not done and there was no need to forego all of these steps.

> Having concluded that the *instanter* procedure was not justified in the circumstances of this case, it is my further opinion that there may be some exceptional cases, involving misbehaviour in court, where the failure to take one or all of the steps I have outlined above will be justified subject to whatever qualifications might be warranted in the context of a *Charter* challenge to *instanter* proceedings.

See also C. J. Miller, *Contempt of Court* (3rd ed. 2000), at pp. 145 *et seq.*

31 In *K. (B.)*, *supra*, at para. 11, Lamer C.J., on behalf of the majority, explained the terminology to be used in respect of contempt of court:

> In order to simplify matters, it is my opinion that we should use the notion of citing in contempt, not as an expression of a finding of contempt but instead, as a method of providing the accused with notice that he or she has been contemptuous and will be required to show cause why they should not be held in contempt.

32 The summary contempt of court procedure is therefore essentially a three-step procedure. While the question of how to proceed is largely within the judge's discretion, given the variety of circumstances which may give rise to this exceptional procedure, it is important to keep these three steps in mind. Citing in contempt may take place any time it is determined that intervention is required. However, conviction and sentencing for contempt of court *instanter*, where it is not "urgent and imperative to act immediately", is an error of law that may be reviewed by an appellate court.

33 In exercising its jurisdiction in respect of contempt of court, a court must adhere to the principle that "only '(t)he least possible power adequate to the end proposed' should be used" (*K. (B.)*, *supra*, at para. 13, quoting Burger C.J. in *United States v. Wilson*, 421 U.S. 309 (1975), at p. 319). When the contempt is committed by an accused who is testifying, the judge's discretion as to how to proceed, which will depend on, *inter alia*, the nature of the conduct in question, should be guided by the need to maintain order and preserve the authority of the court, on the one hand, and not to compromise the impartiality of the judge and the judicial process, on the other. It is in the interests of justice that a jury know that an accused who chooses to testify is compelled by law, like any other witness, to answer the questions put to him or her, and that there are serious legal consequences for failing to comply with the law. To that end, there may be circumstances in which it would be appropriate to convict an accused of contempt of court *instanter*, in the presence of the jury. However, the judge must in all cases avoid giving the jury the impression that he or she is making a determination as to the credibility of the accused. It is essential that the judge not be perceived by the jury as having a negative opinion of the credibility, character or morality of the accused, or as having an unfavourable opinion of the accused in general. The contempt proceeding must not appear, or be perceived by the jury, to be a battle between the accused and the judge or some sort of revenge taken by the judge in response to the accused's behaviour. The judge must maintain an appearance of impartiality in all circumstances.

34 In this case, I am of the view that the judge was justified in commencing contempt of court proceedings using the summary procedure and in citing the appellant for contempt. It should be noted that the contempt is of the court, and the court in this case was made up of a judge and a jury. The refusal by a witness — even if he or she is the accused — to answer the questions put to him or her is an affront to the authority of the court, and it must be remedied in the court in such a way that the jury itself understands that compliance with the relevant law is not optional and understands the consequences for anyone who violates his or her oath.

35 When the appellant decided to testify, he swore to tell the whole truth. Despite the judge's numerous warnings, he refused to answer the questions put to him. The judge had to preserve the authority of the court, and citing the appellant for contempt was an appropriate method of achieving that end.

36 However, the judge erred by combining the citation and conviction for contempt of court in a single proceeding. I do not believe that the judge was justified in convicting the appellant *instanter* and thereby depriving him of the procedural guarantees to which he was entitled. He was even less justified, in my view, in sentencing the appellant to prison on the spot. I do not believe that the circumstances were such that it was "urgent and imperative to act immediately": *K. (B.)*, *supra*, at para. 9 (quoting Lord Denning in *Balogh v. Crown Court at St. Albans*, *supra*). This was not an exceptional situation in which foregoing the formalities required by natural justice was justified. I would again note that this is not an appeal from the conviction or against the sentence imposed for the contempt. The crucial question is therefore not, in my view, whether the appellant was given all the latitude needed to make his defence to the citation for contempt, or whether he had sufficient opportunity to make submissions in mitigation of sentence. What we need to examine, rather, are the consequences that the error had for the murder trial.

37 In my view, the judge erred in exercising his discretion in that there was an inherent risk in the procedure adopted in this case that the jury would misunderstand the meaning of the conviction for contempt and interpret it as representing the judge's opinion of the appellant's credibility in relation to the substance of his defence. The possibility of such a misunderstanding was a significant risk that the judge failed to assess properly. An adjournment was required in this case to ensure that the judge used only the "least possible power adequate to the end proposed" in the exercise of his discretion. What we must now determine is whether in this case the error of law the judge made by adopting the procedure in question in the course of the appellant's murder trial can or cannot be remedied.

B. *Classification of the Error and the Curative Proviso*

38 The distinction between irregularities that occur during a trial that are classified as a "wrong decision on a question of law" (s. 686(1)(*a*)(ii) of the *Code*) and those classified as a "miscarriage of justice" (s. 686(1)(*a*)(iii) of the *Code*) is fundamental, since it will have a direct impact on the applicability of the curative proviso in s. 686(1)(*b*). In *R. v. Khan*, [2001] 3 S.C.R. 823, 2001 SCC 86, at para. 18, this Court summarized the principles that apply when a procedural error or irregularity occurs during a trial:

- If the procedural irregularity amounts to or is based on an error of law, it falls under ss. 686(1)(*a*)(ii) and (1)(*b*)(iii).

- If the procedural irregularity was previously (before 1985) classified as an irregularity causing a loss of jurisdiction: s. 686(1)(*b*)(iv) provides that this is no longer fatal to the

conviction, and an analysis of prejudice must be undertaken, in accordance with the principles set out in s. 686(1)(*b*)(iii).

– If the procedural error did not amount to, or originate in an error of law, which is rare, s. 686(1)(*a*)(iii) applies and the reviewing court must determine whether a miscarriage of justice occurred. If so, there are no remedial provisions in s. 686(1)(*b*) that can cure such a defect, and the appeal must be allowed and either an acquittal entered or a new trial ordered.

39 Later in *Khan*, error of law is defined as any decision that is an erroneous interpretation or application of the law (para. 22). If an error deprives the accused of a fair trial, it constitutes a miscarriage of justice within the meaning of s. 686(1)(*a*)(iii) and the curative proviso of s. 686(1)(*b*)(iii) should not be applied. That type of error was described by McIntyre J. in *Fanjoy*, *supra*, at p. 240:

A person charged with the commission of a crime is entitled to a fair trial according to law. Any error which occurs at trial that deprives the accused of that entitlement is a miscarriage of justice. It is not every error which will result in a miscarriage of justice, the very existence of the proviso to relieve against errors of law which do not cause a miscarriage of justice recognizes that fact. However, I am not able to say that an error which, in the words of Brooke J.A., "could only unfairly prejudice", would not by itself cause a miscarriage of justice. It would be wholly inconsistent with a finding of unfair prejudice in a trial to find, nonetheless, that no miscarriage of justice occurred.

40 In this case, as I noted earlier, it is clear, in my opinion, that the judge committed an error of law within the meaning of s. 686(1)(*a*)(ii) of the *Code*, that error being that he convicted the appellant of contempt of court *instanter* when it was neither urgent nor imperative that he do so. With respect, however, I cannot agree with Fish J.A. that this was a miscarriage of justice within the meaning of the decision in *Fanjoy*, which would prevent any application of the curative proviso. In my view, the appellant did not suffer such prejudice from that error that he was deprived of his right to a fair trial.

41 Section 686(1)(*b*)(iii) provides:

(iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (*a*)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred . . . .

42 Fish J.A. also said that even though there had been no miscarriage of justice, he would not have applied the curative proviso in s. 686(1)(*b*)(iii) in this case. With respect, I do not agree with that opinion either. There are two classes of errors of law that lead to the application of that provision. The first consists of harmless or minor errors having no impact on the verdict. The second "encompasses serious errors which would justify a new trial, but for the fact that the evidence adduced was seen as so overwhelming that the reviewing court concludes that there was no substantial wrong or miscarriage of justice" (*Khan*, *supra*, at para. 26). The test is whether "the verdict would necessarily have been the same if such error had not occurred" (*R. v. Bevan*, [1993] 2 S.C.R. 599, at p. 616 (*per* Major J.), citing *Colpitts v. The Queen*, [1965] S.C.R. 739, at p. 744 (*per* Cartwright J.)). In other words, the "appellate courts will maintain a conviction in spite of the errors of law where such errors were either minor in themselves or had no effect on the verdict and caused no prejudice to the accused" (*Khan*, *supra*, at para. 29).

43 The first question that must be asked is therefore whether the error was harmless and had no impact on the verdict. That is, might the appellant's *instanter* conviction for contempt of court have influenced the jury in relation to the guilty verdict it returned on the murder charge? Perhaps, but in my view, its impact was negligible. In addition, the appellant suffered no substantial wrong as a result of the error committed by the trial judge. Even if that error was not totally harmless, I believe that the "verdict would necessarily have been the same if such error had not occurred" (*Bevan*, *supra*, at p. 616; *R. v. Jolivet*, [2000] 1 S.C.R. 751, 2000 SCC 29). The appellant did not suffer any prejudice as a result of the irregularities, and they did not affect the fairness of the trial in such a way as to justify a new trial.

44 I agree with the opinion of Robert J.A. on this question. While the procedure followed by the judge was inappropriate, the real damage done to the appellant's credibility resulted from his refusal to answer, and not from his conviction for contempt. By refusing to name the individuals who were allegedly the source of the information he had communicated to a fellow inmate to incriminate himself, the appellant himself substantially undermined the merits of his defence. In addition, the jury repeatedly heard the appellant's explanations of his refusal to testify. According to him, he wanted to protect his family from possible reprisals, and his principles prevented him from [TRANSLATION] "giving information to the authorities". The jury was perfectly capable of assessing the credibility of that explanation.

45 Nor can I conclude that the jury may have regarded the conviction for contempt of court as a repudiation of the appellant's credibility or defence by the judge. On the contrary, the judge's charge to the jury on that question suggested that the conviction for contempt was inevitable, regardless of what explanation the appellant gave to justify his refusal: [TRANSLATION] "we do not have two kinds of witnesses, those who can tell just a part of the truth and those who are obliged to tell the whole truth. . . . [T]here is only one law, and in the Criminal Code, here, it says that a witness who refuses to answer is guilty of contempt and if he does it in your presence he will be punished in your presence."

46 In my opinion, what the jury could have inferred from that passage was that the appellant's conviction for contempt was a *fait accompli*, caused solely by his refusal to answer, regardless of the merits of his explanations. In other words, rightly or wrongly, the judge gave the jury to understand that no one could be excused from answering, regardless of his or her justifications. The judge's instructions, in my view, substantially reduced the risk that the jury wrongly believed that the appellant had been convicted of contempt because the judge did not believe his defence. In this case, I therefore do not believe that the appellant could have suffered any prejudice as a result of the conviction or the consequent sentencing, in and of themselves. I would also point out the very strong instruction given by the judge in relation to the prohibition on using the contempt conviction:

> [TRANSLATION] So you may not deduce anything concerning his guilt or lack of guilt from the contempt or the punishment. It would be unfair for you to do that, and you would be violating your oath. [Emphasis added.]

47 The appellant also submits that the trial judge improperly drew a parallel between the contempt of court conviction and a criminal record. Just before discussing contempt of court, the trial judge did explain to the jury that an accused's criminal record could be used only to establish his credibility, and not his guilt. One might think, as Fish J.A. did, that the subsequent comparison between a criminal record and the contempt of court conviction means that a contempt conviction may be used to assess the accused's credibility. In so far as it is an additional conviction, it is technically correct to say that a contempt conviction may be used to assess the appellant's credibility as a witness. However, I believe that it is unlikely that the jury even interpreted it that way. The jury could just as well have concluded that neither a criminal record nor a conviction for contempt could be used to determine the accused's guilt. From reading the charge, I find that the latter interpretation is much more likely.

48 Moreover, in my view, the evidence against the appellant is overwhelming. His defence amounts to no more than his assertion that he fabricated the information he related to the informer, Herby Jean-Charles, on November 18, 1996, which was tape recorded as permitted by an authorization to intercept a private conversation that was obtained on November 6, 1996. The appellant said that he had invented that story after learning from the police and Mr. Jean-Charles that an Emmanuel Zéphyr [TRANSLATION] "was out to get [him]". His justification for concocting an incriminating lie was that he had hoped to earn the respect of his fellow inmates by saying he had committed the murder, and that this "notoriety" might have enabled him to escape any reprisals from Emmanuel Zéphyr. It seems implausible that someone would admit to committing a crime to protect himself from death threats that were allegedly made precisely in reprisal for committing that crime. As well, that statement is inconsistent with the admission made by the appellant to Herby Jean-Charles in January 1996, at which time he had not received any death threats. Lastly, the appellant said that he had put together the details of his lie from

details related in the newspapers, from his imagination and from information provided to him by third parties whom he refused to identify. The appellant freely chose to conduct his defence in such a way as to offer the jury only a partial truth, and that necessarily affected the credibility of his position.

V. Conclusion

49 Accordingly, the trial judge committed an error of law by convicting the appellant of contempt of court and imposing the sentence *instanter*, when it was neither urgent nor imperative that he do so. I am furthermore of the opinion that the error of law committed during the trial, an error that was essentially procedural, did not in itself constitute a miscarriage of justice within the meaning of s. 686(1)(*a*)(iii) or result in a failure of justice. I am also of the opinion that no substantial wrong or miscarriage of justice, within the meaning of s. 686(1)(*b*)(iii) of the *Code*, occurred. While the error committed was not harmless, the verdict would have been the same notwithstanding the error committed by the judge in the course of the trial. In this case, I would apply the following statement made by Binnie J. in *Jolivet*, *supra*, at para. 46:

> Ordering a new trial raises significant issues for the administration of justice and the proper allocation of resources. Where the evidence against an accused is powerful and there is no realistic possibility that a new trial would produce a different verdict, it is manifestly in the public interest to avoid the cost and delay of further proceedings. Parliament has so provided.

50 I would dismiss the appeal.

Appeal dismissed.

Solicitors for the appellant: Rock, Vleminckx, Dury, Lanctôt et Associés, Montréal.

Solicitor for the respondent: Attorney General's Prosecutor, Montréal.